No. 2945

IN THE

United States
Circuit Court of Appeals
For the Ninth Circuit

In re:
QUAN YOU, otherwise known as LOW JUNE, on Habeas Corpus,

Appellant,

vs.

EDWARD WHITE, as Commissioner, etc.

Appellee.

Brief for Appellant

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STATEMENT OF THE CASE.

Quan You, otherwise referred to as Low June, is an alien Chinese person, who returned from a temporary visit to China about the middle of the year 1914, and made application to re-enter the United States as a Chinese Merchant, returning to a commercial domicile therein. As evidence of his right to re-enter, he presented an approved or "O. K."

Merchants Form 431 Return Certificate. This certificate had been issued to him by the Commissioner of Immigration for the Port of San Francisco just prior to his recent departure for China. It was issued after a thorough examination in which it was established by the testimony of two credible witnesses other than Chinese, that he was a merchant and a member of Hing Kee & Co., which is a firm engaged in buying and selling merchandise at a fixed place of business, at 427 Harrison Street, in the City of Oakland, County of Alameda, State of California; that he had been such a merchant for upwards of one year prior thereto, and that during said time he had engaged in no manual labor save and excepting only such as was incumbent upon him in his conduct as such merchant. This claim was also amply supported by the testimony of the manager of the firm, and this appellant, and was further corroborated by the partnership books. An examination of the store showed it to be a *bona fide* mercantile establishment, with none of the prohibitive features. The Commissioner of Immigration for the Port of San Francisco was satisfied, and thereupon approved the form 431 Merchants departure certificate. The appellant went to China thereon, and upon his return he was passed by the Immigration authorities, and landed under the Chinese Exclusion Act, and resumed his residence within the United States on May 11, 1914 (Tr. 5 and 6; Ex. "B".)

The appellant was thereafter arrested in Alabama upon a warrant of arrest issued by the Secretary of Labor charging him with being illegally within the

United States, and after a hearing he was ordered deported by the Secretary of Labor upon the ground that

> "Under Section 21 of the Immigration Act approved February 20th, 1907, being subject to deportation under the provisions of a law of the United States, to-wit, the Chinese Exclusion laws, for the following among other reasons:
>
> "That he has been found within the United States in violation of section 6, Chinese-Exclusion act of May 5, 1892, as amended by the Act of November 3, 1893, being a Chinese Laborer not in possession of a certificate of residence; and that he has been found within the United States in violation of section 2, Chinese-Exclusion act of November 3, 1893, having secured admission by fraud, not having been at time of entry a lawfully domiciled exempt returning to resume a lawfully acquired domicile and to follow an exempt pursuit in this country."
>
> (Tr. 3 Ex. "A".)

The appellant was accorded no hearing before either a Justice, Judge or Commissioner of the Judicial branch of the government.

Upon appellant's arrival at San Francisco, a petition for a writ of habeas corpus was presented (Tr. 2 to 9) upon the return of the order to Show Cause (Tr. 10) the Immigration Record was by stipulation filed as a part of the Petition (Tr. 11.) A demurrer was filed (Tr. 12 and 13) and an order made sustain-

ing it and denying the Petition (Tr. 13.) This appeal is taken therefrom.

POINTS URGED.

1. The appellant is a Chinese alien, and if illegally here, is entitled to have that fact determined by the Judicial Branch of the Government, and the Secretary of Labor is without jurisdiction in the premises.

2. That the Executive hearing was unfair, the defendant not being notified of his right to inspect the record, or being informed of the evidence presented against him, or of his right to be present at any future hearings to be had, and being prevented by the inadequacy of his arraingment from knowing how he could be benefited by having counsel to defend him.

FIRST:

Upon this point it is urged that the appellant did not enter the United States in violation of the Immigration Law, and it is only by a forced, unnatural and we feel unwarranted construction of the facts, that this point is rendered seemingly, but not in fact, tenable.

The Chinese regulations provide for a prior examination of all applicants for admission, under the General Immigration Law, and that the case shall not be examined under the Chinese Acts until it has been passed under the General Immigration Act. This point has been before the lower court, and its views thereon are registered in the case of *ex parte* Wong Tuey Hing 213 Fed. 112.

We may pass from this feature to the real point, and that is whether a person of Chinese descent charged with entering the United States and being therein in violation of the Chinese Exclusion Acts, may be deported in the manner provided for in the General Immigration Law? If the infraction is a surreptitious entry, that is, an entry without inspection, this may be done U. S. vs. Wong You 223 U. S. 67; If the infraction is moral dereliction, this may be done, Low Wah Suey vs. Backus, 225 U. S. 460; Looe Shee vs. North 170 Fed. 566; If the bar is a dangerous, contagious and loathsome disease, it may be done. In re Lee Sher Wing, 164 Fed. 506.

The point here is not substantially a violation of the General Immigration Law, but a claimed violation of the Chinese Exclusion Act. The Chinese Ex-

clusion Act provides its own method of deportation, which embraces a Judicial hearing before a justice, judge or commissioner. Section 43 of General Immigration Act provides that it *"shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent,"* Section 21 of the General Immigration Act providing for the machinery for deportations under that act includes therein all persons liable to deportation under that act, *"or of any other law of the United States."* Now the contention of the government is that the use of the phrase *"or of any other law of the United States,"* gives them the right to arrest, try and deport in the manner provided for in the General Immigration Act, Chinese persons for a violation of solely the Chinese Exclusion Acts. We contend that this would be altering or amending the Chinese Exclusion Acts to the extent of substituting an *executive* hearing for a *judicial* hearing, and is prohibited by said section 43. The cases relied upon by the appellant are:

Ex parte Wong Tuey Hing 213 Fed. 112.

Ex parte Woo Jan, 228 Fed. 927.

U. S. vs. Prentis 230 Fed. 935.
Affirmed C. C. of A. 7th Ct., Oct. term 1916, January session. (Not reported yet.)

Lee Wong Hin vs. Mayo 240 Fed. 368, C. C. of A., 5th Ct.

We interpret the clause *"or any other law,"* as used in this section, to mean merely that when a judicial order of deportation is ready for execution, then the actual deportation may be executed as provided in the General Immigration Law, not that the procedure of arrest and trial shall be had as therein provided. The Chinaman has a substantial right in a *judicial hearing,* which with its greater rights and privileges, better enables him to defend himself against the charge so brought against him. When his judicial hearing is over, and the judgment is a finality, he is only then, in the sense used in the act "liable to deportation" and he cannot be heard to complain whether he be deported by the U. S. Marshall or turned over by that officer to the Immigration officers, for them to place him on the steamer.

The only advantage to the Government which we feel was intended was that the expense or procedure, as the case may be, of providing tickets, etc. would all be in the hands of the Immigration Department, and kept in one uniform account, and their statistical records and research thereof, would be simplified by all being placed through the medium of one set of deportation officers. This interpretation is well within the line of reason and is in harmonious accord with the true operation of both acts, and does not permit the one to encroach upon the other. This construction is in harmonious accord with the statute itself. Section 20 of the General Immigration Law provides for the *hearing* and Section 21 of the *method of actual deportation after* the termination of the hearing, and it is only in the latter section that the phrase *"or of any other law of the United States"* is used.

SECOND.

Under the head of the inadequacy and unfairness of the hearing, we direct attention to the following specific things which we believe constitute acts of unfairness, which have prevented the detained from a fair and impartial hearing to which he is entitled under the statute and the regulations, and further showing that for said reasons the proceedings herein are null and void.

(a) The first point which we desire to urge is that the warrant of arrest in this case is issued in violation of Article 4 in Amendment to the Constitution of the United States in that the warrant of arrest was issued and was not based "upon probable cause, supported by oath or affirmation." The legal presentation of this point is now under submission of this court in case No. 2859, Chin Ah Yoke alias Jane Doe, Appellant, vs. Edward White, as commissioner, etc., taken under submission at the February term of this court, and reference is made to pages 21 to 27 inclusive of the brief for appellant, filed in said matter, for the presentation of the legal view raised upon behalf of the appellant herein on said point.

(b) The Immigration regulations promulgated which govern such executive deportation proceedings are found in Rule 22 sub. 4 as follows:

> "Executive of warrant of arrest and hearing thereon:
>
> (a) Upon receipt of a warrant of arrest the alien shall be taken before the person or persons

therein described and granted a hearing to enable him to show cause, if any there be, why he should not be deported.

(b) During the course of the hearing the alien shall be allowed to inspect the warrant of arrest and all the evidence on which it was issued; and at such stage thereof as the officer before whom the hearing is held shall deem proper, he shall be apprised that he may thereafter be represented by counsel and shall be required then and there to state whether he desires counsel or waives the same, and his reply shall be entered on the record. If counsel be selected, he shall be permitted to be present during the further conduct of the hearing, to inspect and make a copy of the minutes of the hearing, so far as it has proceeded, and to offer evidence to meet any evidence theretofore or thereafter presented by the Government. Objections and exceptions of counsel shall not be entered on the record, but may be dealt with in an accompanying brief."

The defendant in this deportation proceeding was arrested and a hearing accorded under said warrant on July 28th, 1916, before Inspector Worden at Ensley, Alabama. The examination of the defendant comprises some 11 pages of single spaced examination, and at the conclusion thereof is found the following proceedings which were meant to consist and be an arraingment of the defendant in which he should be informed of his rights, which are the identical rights set forth in the foregoing extracts of rules

and regulations. The concluding part of the examination which was sought to be a compliance with the regulations, is as follows:

"Q. I can produce a witness who will testify that you left Tuscaloosa in the early part of 1912 for San Francisco with the intention of going to China?

A. No, I went to China from Hing Kee & Co. store.

Q. Do you deny that you were in Tuscallosa in the early part of 1912 running the Loo June laundry?

A. No, I was not in that place in 1912.

Q. This hearing is granted you in order that you may show cause why you should not be deported to the country whence you came in conformity with law. Is there anything further you wish to say as to why you should not be deported?

A. How can you deport me to China when I am not a laborer. I just came here to collect money for the firm of Hing Kee & Co., and I have a certificate that I am a merchant.

Q. Yes, you have a certificate that you were admitted as a merchant but I have found you doing laundry work,—laboring?

A. Yes, but I was not working for myself, I was just helping,—the laundry does not belong to me.

Q. Is there anything further you wish to say as to why you should not be deported?

A. No.

Q. Under the terms of the warrant upon which you have been arrested, you may be released upon giving a bond in the sum of $1000. Are you in a position to give that bond?

A. I have two friends in Birmingham who can go on my bond.

Q. You have a right to be represented by a lawyer at this hearing if you so desire. Do you wish to employ one to represent you?

A. No."

It will be noticed in the foregoing proceedings, that the Inspector did not notify the defendant that he was entitled to inspect or see the record in his case, did not advise him that he was entitled to know the evidence submitted against him, or see or inspect the evidence upon which the warrant was based, nor was he advised that there were to be any future or further or other hearings in the said case, and finally, he was not advised of his right to have a brief or counter showing made on his behalf, all of which the regulations presuppose the defendant shall be advised of. Owing to the inadequacy of the substance of the information conveyed to this defendant of his rights in the premises, he quite naturally stated that he did not want an attorney, because it is obvious that he could not see what use an attorney could be to him. He had been taken up and thoroughly examined without an attorney, or without being notified that he could have an attorney, and then, at the conclusion of the examination, when an attorney could be of no service to him that he knew of, he was told he

might have one, but for what purpose, he was not informed.

It is respectfully submitted that whether an alien accepts counsel or not, he certainly is entitled to be present at all future or other hearings had in his case. If an alien elects to stand trial without an attorney, that does not mean that he shall not himself have the right to be present at any future hearings. It appears in the record contained in Exhibit "A," that the day following the hearing upon which the proceedings hereinbefore quoted were had, the Immigration Inspector conducted another hearing in the case of this defendant, without having given him notice, or permitting him to be present, and at this hearing a witness by the name of Lunie Dunn was examined under oath, and gave testimony detrimental to the defendant. That the defendant was not present at the examination is shown by an inspection of the caption thereof, and is also shown by the fact that the witness under examination had to identify the defendant by photographs in the possession of the examining immigration Inspector. Presumably this witness Lunie Dunn, is the witness referred to by the examining Inspector in the concluding portion of his examination of the defendant, but it nowhere appears in the record that the defendant was notified that this examination was to take place, or given or afforded any opportunity of being thereat in person, or with an attorney.

The fact that the defendant in this matter was inadequately informed of his rights, and to that extent prevented from employing an attorney at the time of

the hearing, is shown by the fact that after the conclusion thereof, he did employ an attorney, who addressed letters to the immigration officials, trying to find out something about the status of the case of the defendant, presumably for the purpose of submitting some kind of a defense. Unbeknown to the defendant, he was even at that time under an order of deportation, but it appears from the correspondence that he was designedly not notified of that fact. It does appear from the record that the immigration Inspector who received the letter from the attorney, wrote to the Department at Washington, for information, as to what attention he should pay to this letter from the attorney, and that is about all that the immigration record discloses was done with respect to enlightening the attorney, who finally sought to appear upon behalf of the defendant. It is respectfully submitted upon this point, that this hearing falls far short of affording the defendant a fair or adequate opportunity of presenting a defense to the charge made against him. It is of course, obvious that the convenience of the Immigration officers should be respected, but we do not feel that the rights of the defendant are to be entirely sacrificed to the convenience of these officers, who travel through the country holding these investigations. The hearings seem to be conducted to suit the convenience of the Government in presenting their case against the defendant, but it does not seem to be such a hearing as affords the defendant any fair opportunity to present a defense. Certainly, if he does not know what evidence is offered against him, he does not know whether he

needs an attorney to defend him, or whether he needs to present any defense other than his own sworn testimony, which was presented in this case. Upon the holding of the court in the following cases, it is respectfully submitted that the judgment in this case should be reversed.

We think the particular elements of unfairness of the hearing set forth herein warrant the issuance of the writ of habeas corpus as prayed for in the petition in this matter, upon the ground that the hearing accorded was unfair upon the authority of the following decisions:

Low Wah Suey vs. Backus 225 U. S. 460.

Chin Yow vs. U. S. 208 U. S. 8.

Wong Yee Toon vs. Stump 233 Fed. 194.

Whitfield vs. Hanges 222 Fed. 745.

Ong Chew Lung vs. Burnett 232 Fed. 853.

Chan Kam vs. U. S. 232 Fed. 855.

Ex parte Lam Pui 217 Fed. 456.

Ex parte Lam Fuk Tak 217 Fed. 468.

McDonald vs. Sin Tak Sam 225 Fed. 710.

U. S. vs. Williams 200 Fed. 538.

U. S. vs. Williams 189 Fed. 915.

U. S. vs. Williams (affirmed) 206 Fed. 460.

U. S. vs. Williams 175 Fed. 274.

Respectfully submitted,

GEO. A. McGOWAN,
Attorney for Appellants.